THE DEFECTS OF THE LUNACY LAW:

A VINDICATION

OF THE DECISION OF

THE LORD CHIEF BARON

OF THE COURT OF EXCHEQUER,

IN THE CASE OF

NOTTIDGE *versus* RIPLEY.

BY

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THE DEFECTS OF THE LUNACY LAW.

Since the close of the last Session of Parliament, the Lord Chief Baron of the Court of Exchequer, in a Court of *Nisi Prius* after Trinity Term, has made a striking and palpable exposure of the primitive and narrow-minded character of our common law, and the insufficiency of our statutes, relative to the affairs of lunacy and lunatics. And inasmuch as it is as probable as it is exigent that the subject will be legislated upon in the coming Session of Parliament, it becomes interesting and profitable at the present moment to inquire what is the actual state of the law—its spirit, limits, wisdom, and folly—touching this question.

This may be done in a *coup d'œil* of the now celebrated case of Miss Nottidge: in which the judge enunciated the legal maxim that dangerous lunacy alone indicates the criterion for confinement in a lunatic asylum; and the jury determined that the clear and unequivocal religious monomania under which the lady suffered did not constitute legal unsoundness of mind. These,

be it observed, are not only the facts of this individual case, but despite all the clamour and remonstrance with which the judge who presided over these proceedings has been visited, *it is* the law of the land.

Society at the present moment presents one of those interesting and frequently recurring spectacles in its progress, when the degree of its intellectual refinement, and the consequent expansion of its sympathies, has prepared it to recognise weakness and injustice in its laws. Society, in relation to its laws, may be compared to a hardy plant rapidly developing in a glass case, which soon fills and then bursts its fragile barriers. It has now lived through its days of superstition, and its laws have received a corresponding modification. We no longer consign our witches to the pillory or horse-pond; or believe that Her Majesty's hand has the same influence over scrofula as iodine or cod liver oil. New ideas are constantly being evolved amongst us, and as constantly new moral obligations make themselves felt. Society is in precisely such a state of transition now; but its enlightenment is in advance of its laws: both its head and its heart have become enlarged, and it is reducing to practice ideas which the voice of the judge cautions us have not yet been embodied in our laws. There was a time when it was matter of popular belief that Charles the First was an image of

Christ; that Cromwell, who killed him, and reigned in his stead, was the devil; and that Charles the Second was Christ come again. What was *then* a tenable opinion and matter of faith with multitudes, is *now* recognised, when occuring spontaneously in the individual, as a delusion, and indicative of unsound mind. It is sufficiently clear to the minds of all those familiar with the features of mental aberration, that Miss Nottidge, who believed that a certain clergyman was the Deity, was in this latter condition; and this judgment gains confirmation when we reflect upon the fact, acknowledged in court by different members of the Agapemone, that far from it being one of the doctrines of the association to regard its head and chief as an incarnation of the Almighty, they pronounced that the individual must be insane who entertained such a belief. What, in days of ignorance, was merely a fanatical error, becomes, in more enlightened times, a sign of disease. It would give us no cause of alarm to hear a thoroughly ignorant individual affirm that ten times ten were ninety-nine; but it would give us cause for serious apprehension if an accomplished friend made a similar affirmation. The experience of every day pronounces these distinctions to be just and true; and we rather treat in a lunatic asylum what were formerly called "false and pretended prophecies," than punish them with "forfeiture of all goods

and chattels, and imprisonment during life," as prescribed by the 5. Eliz. c. 15. Thus, the doctrine of Sir Edward Coke must be taken, *cum grano salis*, when he affirms that "*legal* reason hath been fined and refined by an infinite number of grave and learned men, and, by long experience, grown up to perfection: no man, therefore, out of his own private reason, ought to be deemed wiser than the law, which is the perfection of reason." It would perhaps have astonished Sir Edward to know that in our days we should not allow another Diogenes to live in a tub; that we should deprive him of liberty either as a vagrant or a lunatic. And he would, doubtless, have felt as much surprise at *our* idea of taking away the liberty of a man with the view of curing him of the notion that his head was made of glass or butter, as Hippocrates was astonished at the people of Abdera that they should have accused Democritus of insanity because he showed no sympathy with his fellow-men; laughed at their calamities; lived in a cave of the earth; and put out both his eyes. But in this last case we are at a loss which to prefer—the judgment of the people or of the physician.

Two questions of grave import have thus been raised and settled by Sir Frederick Pollock. The one—that the dangerous lunatic alone may be confined; the other—that religious monomania is not legally comprehended in the expression

"unsound mind." It is sufficiently clear that these maxims set forth the spirit and intention of the common law upon the subject; and that the statutes cannot be strained to give any new definitions, or extend the limits, or give any *new* authority over and above that declared by the common law. It matters not what custom had, without authority, introduced into the practice of lunatic asylums; or what the judge's own private opinion may have been as to the present demands of society; he took the common and statute law as his guide; and although he might have had it in his power to have modified the first of the foregoing maxims in accordance with the advancement of medical science and established usage, yet he had no data to go upon; as, unfortunately, our medical literature pronounced and recorded the same rule,* and thus assisted in the creation of this impracticable and narrow-minded precedent. Nevertheless, medical writers, with ineffable inconsistency, appear in the van of those who have attacked the Lord Chief Baron and his dictum. It is, palpably, the grossest absurdity to impeach the judge for the results of this case; he has merely expounded the law—extreme law it may be—but the law nevertheless. The law only is at fault: and if we insist upon attacking the law in the

* See Indications of Insanity, by Dr Conolly; The Duality of the Mind, by Dr Wigan, &c. &c.

person of his Lordship; hold him responsible for all its fatuities; and treat him as the proxy of Sir Edward Coke and his predecessors—Sir Frederick Pollock will stand forth to us in a somewhat similar spirit and attitude to that maintained by Cato, who, when at the age of 86, he was accused of certain offences of his past life, committed at times long gone by, said, with profound sagacity: "It is difficult to render an account of one's own conduct to men belonging to an age different from that in which one has lived."

Our only legal definition of unsound mind, and the criteria authorizing incarceration in a lunatic asylum, are to be found in the common law. Thus it appears that the spirit and powers of our lunacy provisions are what they were when Sir Edward Coke sat upon the bench. And this is to indicate sufficient antiquity, seeing that his definitions and deliverances do not differ much from those of Justinian upon the same subject. Unsound mind, in the sense in which it is understood by the common law of England, means—the helplessness of idiotcy, the ravings and fury of the maniac, and the incapacity of lunacy; the legal meaning of this latter being the different forms of intermittent dementia and mania. And all these forms of mental alienation are obviously *dangerous;* and because they are so, it authorizes, in such instances, deprivation of the civil liberties

of the individual. The English law has always watched and guarded with especial care the maxim—that "the title to an Englishman's liberties is older than the oldest title to any estate." The necessity for isolation was recognised only in these three forms of disease. The idiot would die from starvation and neglect; and the others were well known to be capable of every form of violence and dangerous act.

It will be asked—Have not modern statutes modified the common law, and conferred new powers and authority, and introduced modern definitions, limitations, classifications, and refinements of science? It is of immense importance to know that they have not done so. The whole of the statutes upon this matter actually *restrain*—not *enlarge*—the authority conferred by the common law. No *new* power is conferred or new definition of insanity given. The statutes only prescribe the *mode* in which the common law shall be administered. They deal in forms and processes, but never touch the spirit or will of the common law. And if it cannot be shown that any statute exists altering the common law, it of course remains *in statu quo*.

The purport and intention of the statutes upon this subject may be shown in few words. One of the earliest was enacted in the fifteenth century, consigning the care of idiots and lunatics to the king. This prerogative afterwards passed to the

Lord Chancellor. In the reign of George II., no public provision for the care and protection of lunatics seems to have existed; and if these unhappy beings had no friends or relations to care for them, they were allowed to wander about the country, to the great danger of the public. This state of things called forth a statute authorizing justices of the peace to place under restraint lunatics who disturbed the public peace. No asylums were, however, provided for them, nor provision for their maintenance enacted, and these unfortunates were crowded into jails, and subjected to the most shocking treatment and deprivations. The fate of the lunatic was now such as it is described in those harrowing minutes of evidence of committees on madhouses, formed in George the Third's reign. And all the subsequent statutes have had for their object the remedying these abuses and the amelioration of the confined lunatic. With this intention they order the building of lunatic asylums in convenient situations, and prescribe the mode of raising the funds necessary both for their erection and the maintenance of the patients. They appointed commissioners for superintending and watching over their affairs, with the view of preventing abuses, and securing their efficiency. And they prescribe the orders, medical certificates, and reports necessary for the admission of patients into the lunatic asylums; but in none of these statutes do we find

anything altering, amending, or amplifying the powers of incarceration given by the common law. They never touch the question—What is to be understood by unsound mind? The answer to this question is to be found only in the common law, and nothing but a statute can alter this definition, or allow a better one to pass current. In the preambles of these acts we often meet with the intention to "amend an act," but never to *amend the common law*, and this is, and has been, an obvious necessity. The statutes use the expression, "unsound mind," in a general, undefined sense; and it is a rule in the construction of statutes, that "when the provision of a statute is general, it is subject to the controul and order of the common law, and it shall be construed accordingly."

It has been objected to the decision of the Lord Chief Baron in the case of Miss Nottidge, that the recent statutes upon lunacy affairs, although they do not directly affirm that non-dangerous persons may be confined in lunatic asylums, do, by implication, give this authority; and reference is made to the series of queries attached to the order for confinement, one of which asks, "whether the patient be suicidal or dangerous to others?" But it is obvious that this inference is vastly overstrained, and that we are not justified in making so sweeping a deduction from the question; for, supposing this question to be

answered in the negative, the presumption still remains that the individual was dangerous to property, or the public peace, and therefore coming under the definition of the common law, which authorizes the incarceration of the dangerous classes of the insane only.

Before Sir Frederick Pollock showed the true relation subsisting between the common and statute law, and the degree in which the one was interpreted and limited by the other, it was the universal practice for individuals to take the statutes, and the statutes only, as their guide; setting their own interpretation and limitation upon the general expression, "unsound mind;" never calculating that in so doing they were usurping the functions of the common law. In a modern sense, this expression may mean any form of mental disease recognisable by the aid of common sense; or, in a transcendental sense, it may mean a disease or condition common to the whole human race, according to the dictum of Dr Haslam, given upon the trial of Miss Bagster, in 1832, who affirmed that all men were of unsound mind, and that God alone is of sound mind. The same idea was expressed by the poet in the days of old Rome — "*nemo* mortalium omnibus horis sapit." And it is a singular coincidence that this dictum was given in answer to a question from the present Lord Chief Baron of the Court of Exchequer, now Sir Frederick, at

that time Mr Pollock. It is probable that the vague and undefined manner in which the statutes employed the term unsound mind, and the extraordinary latitude which he at this time discovered might be given to it—manifestly endangering the whole doctrine of civil liberty — made Sir Frederick Pollock feel the necessity of taking his stand upon ground where alone he found clear and unequivocal definitions, and within limits which —*mirabile dictu*—the medical literature of the times chalked out as safe and judicious; and it admits of little or no doubt, that, considering the high and safe ground which the Lord Chief Baron has taken in this individual case, until the laws are modified, not only will his Lordship lay down the law in a similar manner in a similar case, but every other judge will follow in his footsteps; and the result will be that few cases of monomania, treated in lunatic asylums, will be able to bear the test which courts of law can and will apply to them.

The statutes, be it observed, not giving us any definition of the term unsound mind, nor affording us any criteria for judging of the propriety of confinement in a lunatic asylum, medical men and others have been in the habit, hitherto, of appealing to common sense, and have determined for themselves the degree and kind of mental unsoundness calling for confinement; but this decision in the case of Miss Nottidge has thrown

all parties into confusion; and the general and customary practice in lunacy affairs and the law are found to be so widely different from, and contradictory of, each other, that all men concerned pause in alarm and uncertainty, not knowing whether to follow established custom, enlightened as it is by science, and approved of by common sense and feelings of benevolence, or to follow "extreme law," which at the present hour must be regarded as "extreme injury."

It does not appear that we have any authority for placing an individual in a lunatic asylum with the view simply to any curative process. Seclusion, in the eye of the law, is merely another and milder term for *imprisonment*. We are thus restricted in the use of a most potent remedy in the treatment of disease. Isolation, the removal from home, and the scenes and circumstances in which mental disease has originated, is, in many instances, alone sufficient for cutting short a disease which, without the assistance of this measure, would prove intractable and incurable. This is a plain and palpable truth. Nevertheless, it has not entered into the philosophy of the common law; and, therefore, remains suspended before us as forbidden fruit. Nor is this extraordinary, seeing that the common law, which breathes rather a spirit of protection to civil liberty, than aspirations of science and benevolence, makes its voice heard, and puts *its* con-

struction and interpretation upon our statutes at the distance of centuries, irrespective of what times present may know and feel to be a more exalted and true humanity. It is a point of surpassing interest and importance at the present moment to know that a man cannot be incarcerated simply because he is diseased, and for the purpose of curing him. In our hospitals for general disease, we never perform an operation against the will of the patients; and in the eye of the law, to deprive a man of his *leg* or his *liberty—per vim*—with a view to any curative result is an act that admits of no justification.

Dr Conolly's "Remonstrance with the Lord Chief Baron" does not address itself to the real evil of the times. It confounds *reality* with mere *propriety*. It mistakes that which *ought to be the law*, for that which *is*, *in reality*, the law; and it upbraids the judge for doing that which his office demanded of him,—viz., the reading and administration of the law as he found it, instead of expounding and authorizing the more enlightened code of expediency. The whole "Remonstrance" is vitiated by this leading and all-pervading idea, and is consequently expressive rather of a benevolent regard for the interests of the insane, than of any judicial irregularity in the exposition of the law. How thoroughly *mal-a-propos*, for instance, does not the following pragmatical "remonstrance" appear—"I trust no parent and no medical prac-

titioner will be deterred from the only wise course to be pursued in such cases, even by the authority of your Lordship, supported by the newspapers." And again—"Your apparent disregard of all these circumstances, my Lord, and your opinion, gravely, emphatically, and authoritatively given, that no insane person should be confined except when dangerous," &c. It is plain that *no* "disregard of circumstances" has been perpetrated except by the censors of the judge, and they have really so far mistaken the facts of the case, that much of their reasonings and remonstrances have quite a Quixotic character. The law allows—what the court has awarded—and no more. No man can be censured for changing his opinion; but we cannot avoid feeling disapprobation of the conduct of the individual who teaches a certain set of opinions to-day which to-morrow he upbraids another for holding and applying in practice, more especially when such remonstrance is unaccompanied by any acknowledgment of his own errors, or extenuation of those of his neighbour.

We now perceive the precise relations of law and lunacy; the real cause of all the misapprehension and mischief which has recently been achieved in consequence of these relations; and what will probably be done in the ensuing Session of Parliament with a remedial intention. What we want is a statute remedial of the defects of

the common law as applicable to lunacy affairs, granting us a power and authority to treat mental unsoundness according to the principles of common sense, benevolence, and scientific enlightenment. In order to this, it will be necessary to enact *two* things. The *one*—that in questions relative to the detention of individuals in lunatic asylums, the definitions of the common law in regard to unsoundness of mind shall be considered weak, narrow-minded, and inaccurate, and therefore null and inoperative. The condition unsound mind, being understood to mean that condition of *mental* or *moral* obliquity or infirmity, which common sense easily recognises as disease or incapacity, but which neither needs nor admits of any precise definition to distinguish it. The *other*—declaring that individuals may be detained in lunatic asylums, if pronounced upon oath by competent individuals to be of unsound mind, and requiring treatment or protection in a lunatic asylum; and that this shall be lawful both for the dangerous and the harmless insane; for the purposes of cure of the mental disease, as well as for the protection of the patients and the public.

These two enactments would answer the demands of the present hour. It is vain to object to these propositions, that the process of incarceration is too easy. The process of illegal incarceration is easy only in those cases where

perjury shall be perpetrated by a number of professional individuals. If a combination of individuals will bear false witness that I stole a watch, I can be incarcerated in the common jail; but who ever dreams of feeling uneasy under such a possible danger? Nor is the danger of false incarceration in a lunatic asylum one jot more imminent or probable. The two foregoing maxims being laid down, the application of them, and everything else relative to lunacy affairs, may be safely entrusted to the dealings of common sense, common honesty, and common humanity.

It is sufficiently clear that, although the provisions of the law for the humane treatment and protection of the confined lunatic are most complete and beyond all praise, as evidenced by its enactments for the erection and management of our lunatic asylums, and the incorporation of commissioners to watch over their arrangements, the law, in so far as it regards the power and authority for making these provisions, which are real and unequivocal remedies for mental disease, available to the necessities of the afflicted, is lamentably deficient. The Lord Chief Baron, in having made the exposure by taking his stand upon the common law, has rendered us great and good service by pointing out the error under which we were living and acting, and what we obviously require at the hands of our legislature. The remedy which we expect it will apply, will more

than compensate for the confusion and mischief which were the immediate results of his Lordship's official expositions. But this remedy can only be supplied by a new statute; for we learn from our law authorities, that "precedents and rules must be followed, even when they are flatly absurd and unjust, if they are agreeable to ancient principles; because, what is clearly the law of England, can only be abrogated by the authority of King, Lords, and Commons, in Parliament assembled." And, moreover, the law of the land says, that "when an old custom is fallen into disuse, or become disputable, to avoid difficulties, Parliament declares by a statute what the common law is." Until the antiquated and narrow-minded view of mental disease, of which we complain so much, and which has lately achieved so much mischief, be thus dealt with, lunacy affairs will continue to be characterised by misapprehension and uncertainty; transacted without authority; and that benevolent but mistaken remonstrance and cavilling which has been lately heaped upon the Lord Chief Baron, so injurious to the dignity of the bench, will be, for a certainty, of frequent repetition. Moreover, this is a question which concerns the permanent tranquillity of many an afflicted family, who naturally contemplate with horror the possible exposure and litigation at present suspended over them.

It is to be ardently desired that Lord Ashley will continue to interest himself in this question; which is, assuredly, one worthy of the exercise of his commanding talents, and which the whole tenor of his philanthropic life, and long acquaintance with the wants of the afflicted in lunatic asylums, qualify him in an especial manner to treat.

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